

**BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA**

**DOCKET NO. 2009-326-C**

IN RE:

State Universal Service Support of Basic  
Local Service Included in a Bundled  
Service Offering or Contract Offering

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) **BRIEF OF SOUTH CAROLINA CABLE**  
) **TELEVISION ASSOCIATION,**  
) **COMPSOUTH and tw telecom of south**  
) **carolina llc**  
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Pending before the Public Service Commission of South Carolina ("Commission") in this docket is the question of whether Incumbent Local Exchange Companies ("ILECs") should receive subsidy funding from the South Carolina Universal Service Fund ("USF") for providing unregulated "bundles" and "contract offerings" as defined by S.C. Code Ann. §58-9-285. This brief is submitted by the South Carolina Cable Television Association, CompSouth and tw telecom to argue that no such funding should be allowed.

Legislation passed by the South Carolina General Assembly and orders issued by this Commission make it clear that the USF was intended to make sure that people in this state would continue to have access to basic local service (the proverbial "phone on the wall") at low, regulated prices despite the advent of competition in local markets. Because the USF provides subsidies to certain companies in a competitive marketplace, it should be carefully limited to this original purpose. There is no basis for allowing the ILECs to expand the use of the USF to subsidize their advanced, competitive offerings of voice, data and video services. This brief will show that bundles should not be supported by the USF, and it will show that the arguments made by the ILECs in favor of subsidizing bundles and contract offerings are at odds with the statutory

provisions enabling the USF and the Commission's orders establishing it and providing for its operation.

**Statutory Provisions Authorize the USF  
to Support Only Price-Regulated Basic Local Service**

The USF is authorized by S.C. Code Ann. §58-9-280(E). That provision states that the USF is intended to continue "...South Carolina's commitment to universally available basic local exchange service at affordable rates...." Subsection (4) of §58-9-280(E) sets out the size of the USF:

The size of the USF shall be determined by the commission and shall be the sum of the difference, for each carrier of last resort, between its costs of providing basic local exchange services and the maximum amount it may charge for the services. The commission may use estimates to establish the size of the USF on an annual basis, provided it establishes a mechanism for adjusting any inaccuracies in the estimates.

These two statutory provisions established a fund to subsidize basic local service priced at "maximum" levels below the cost of providing that basic local service. This was the traditional, regulated service that ILECs were required by law to offer to any customer in their service area.

This obligation to offer basic local service at a regulated price throughout a specified service area is what makes the ILECs "carriers of last resort." The creation of the USF was a part of the "regulatory compact" between the State of South Carolina and the ILECs. This Commission described the concept of the regulatory compact in the electricity context in Order No. 96-15 in Docket No. 95-1000-E as the relationship between granting the utility a monopoly service area and then regulating rates to prevent the utility from earning monopoly profits. See Order No. 96-15, at p.51. In its orders creating the USF this Commission recognized that prior to deregulation of the telecommunications market there was the same type of regulatory compact in place:

LECs were granted exclusive franchises to serve particular local exchange areas. In return the LECs assumed an obligation to serve all customers within that area, no matter how remote the customer was or how sparsely populated the area. These high cost areas were often expensive to serve. LECs were prohibited, however, from pricing services to high cost areas differently from the lower cost areas.

Order No. 2001-419 in Docket No. 97-239-C, at pp. 26-27. The Commission also recognized that competition would not allow the continued implicit subsidization of below-cost basic local service rates and that an explicit source of subsidy would have to be created. *See* Order No. 2001-419 at p. 27. The specific terms of the regulatory compact were changed but the underlying principle was the same: because the ILECs would continue to be required to provide basic local service at regulated, below-cost rates, they would be able to draw subsidy money from the USF. The concept is clearly seen in the treatment of the question of whether second lines would be subsidized:

It is important to keep in mind that primary and secondary lines are not separately tariffed. The second line is still being provided at a tariffed rate that is below cost. If secondary lines were not eligible for State USF, carriers should not be required to provide those lines below their cost.

Order No. 2001-419 at p.43.

The key element in this arrangement is the ILECs' obligation to offer basic local service at regulated, below-cost prices; an obligation that is completely absent with respect to unregulated, bundled services. The USF regulatory compact, as authorized by the General Assembly and implemented by this Commission's rules applies only to regulated, below-cost services and not to unregulated, market-driven services. The ILECs bundles cannot be subsidized by the USF.

## **The ILECs' Bundles**

The record in this proceeding is very clear that the bundled offerings of the ILECs are not eligible for USF subsidies. This proceeding is only concerned with services meeting the definition of either "bundled offering" or "contract offering" as those terms are defined in S.C. Code Ann. §58-9-285(A). Under the provisions of §58-9-285(B) the Commission may not "impose any requirement related to the terms, conditions, rates or availability of any bundled offering or contract offering...." The Commission's jurisdiction over bundles and contract offerings is limited to hearing complaints and when it does it must follow "...the same principles that apply when a court of general jurisdiction enforces the terms of an unregulated contract between two parties." S.C. Code Ann. §58-9-285(B)(2). The General Assembly could not have been clearer when it deregulated bundles: telecommunications companies can offer the type of bundles they want to, where they want to offer them, at the prices they set.

The ILECs participating in this proceeding have availed themselves of the opportunity to offer bundles deregulated by S.C. Code §58-9-285. Century Link witness Ann Prockish described the bundles her company offers and testified that the company determines what services at what prices it will include within the bundle and that it needs no approval from this Commission for the prices it charges for its bundles. Tr. 68-70.<sup>1</sup> Windstream witness William Kreutz likewise testified that there was no maximum price for bundles and that this Commission has no authority "to direct us where to deploy bundles." Tr. 134. Home Telephone Company witness Keith Oliver gave a real life demonstration of the effect of deregulation of bundles by

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<sup>1</sup> We ask that the Commission take judicial notice that Century Link also takes the position that this Commission has no jurisdiction over its DSL service. See Answer dated July 21, 2008 of United Telephone Company of the Carolinas in Docket 2008-232-C, Complaint of E.R. Rutter ("To the extent that Mr. Rutter's Complaint involves the deployment of DSL services, these services are unregulated information services under the jurisdiction of the Federal Communications Commission and over which this Commission has no jurisdiction.")

describing two different types of bundles that his company sells. The higher priced, more desirable "Velocity" bundles are available only in select neighborhoods where Home, in its discretion, exercising its marketing and business judgment, chooses to offer them and this Commission does not have the authority to second guess Home Telephone's decisions. Tr. 325-328.

The record is clear that these bundled services, authorized by Section 58-9-285 and offered by the ILECs based on their marketing judgment, are outside the regulatory compact that is the basis of the USF. The USF subsidizes regulated services over which this Commission has jurisdiction. It should never be allowed to subsidize bundles or contract services.

### **Bundles Are Not Basic Local Service**

One of the arguments advanced by the ILECs is that they should continue to receive USF subsidies for bundles because included within the bundle of services are all the elements of basic local service. This argument fails because of the relevant statutory provisions and this Commission's USF orders in Docket 97-239-C. In the first place Section 58-9-285(A)(1), which defines a bundled offering, makes it clear that a bundle must be something different from the services which are parts of it: "the bundled offering must be advertised and sold as a bundled offering at rates, terms, or conditions that are different than if the services are purchased separately from the LEC's tariffed offerings." With this language the provision deregulating bundles makes it crystal clear that services included within the bundle are not the tariffed services that make up the bundle. Therefore the bundle cannot, as a matter of law, include the regulated, tariffed basic local service that is eligible for USF subsidies.

The ILECs' argument is also inconsistent with the operation of the USF since its inception. All of the witnesses testifying for the ILECs acknowledged that they provide services

that are not subsidized by the USF but which provide all of the elements of “basic local service” as that term is defined by S.C. Code Ann. §58-9-10(9). Prokish, Kreutz, and Oliver all agreed that their companies offer services that include all of the specific functionalities of “basic local exchange telephone service” but that do not currently qualify for USF subsidies. Tr. 65-66, 130-131, 323-324. The important point is that since the beginning of the USF the ILECs have made a distinction between some of their services that provide the functionalities of Section 58-9-10(9) that are eligible for USF support and other services that provide the same functionalities but are ineligible. Thus the argument by the ILECs that, simply because a bundle includes the same functionalities it should be subsidized, finds no support in the current operation of the USF. The determining factor for whether a service is entitled to support is whether it is regulated as to price and availability by this Commission, not whether it includes the elements of Section 58-9-10(9).

### **The ILECs Are Not Entitled to a Lump Sum Payment from the USF**

Included within the arguments advanced by the ILECs in this proceeding is the idea that they are entitled to receive a certain lump sum of subsidy money without regard to what services they are providing. Apparently they think that they are entitled to keep receiving the same lump sum indefinitely even as more and more of their customers choose to buy deregulated bundles. This argument finds no support in the USF statutes nor in the Commission orders implementing the USF. It appears to be an effort to rewrite the rules of the USF because of changes in the telecommunications market. This idea of perpetual entitlement to the subsidy is also at odds with this Commission’s Guidelines and Administrative Procedures that were adopted on the recommendation of many of the very same ILECs that now seek to ignore them.

As discussed above, the statutory authorization for the USF is found in S.C. Code §58-9-280(E). Specific subsections make it clear that ILECs are not entitled to fixed lump sum

payments. For example, S.C. Code Section 58-9-280(E) (4) establishes the size of the fund as a calculation of the difference between costs and maximum prices. That provision requires that “[t]he commission may use estimates to establish the size of the USF on an annual basis, provided it establishes a mechanism for adjusting any inaccuracies in the estimates.” It is obvious that a fund that is re-sized annually with a true-up requirement is not consistent with a lump sum payment continuing indefinitely. Similarly, S.C. Code Section 58-9-280(E) (8) allows the Commission to expand the “set of services within the definition of universal service” under certain conditions. If ILECs are entitled to a lump sum from the USF without regard to what services they are actually providing there would be no need for a provision to allow for the inclusion of additional services. These statutory provisions, and others, are clearly inconsistent with the ILECs’ contention that they are entitled to receive a lump sum subsidy payment from the USF without regard to changes in their customers and services.

Commission orders also conflict with the lump sum argument. In Order No. 2001-996 in Docket No. 97-239-C this Commission adopted two documents: “Guidelines for South Carolina Universal Service Fund (USF)” and “South Carolina Universal Service Fund Administrative Procedures.” The documents were prepared by the South Carolina Telephone Association, a group of ILECs, based on proposals by that group modified by previous Commission orders. These two documents established rules and regulations for how the USF is supposed to operate. There are a number of provisions of these two documents that are relevant to the issues in this proceeding and that demonstrate that ILECs do not receive funding on a lump sum basis.

From page 5 of the Guidelines:

Fund payments shall be distributed to providers of supported services based upon Commission-approved guidelines. All providers must submit reports to the Administrator to receive payments.

The funding is associated with each individual single-party residential or single-line business line regardless of its classification as a primary or non-primary line.

From the Administrative Procedures:

**HIGH COST SUPPORT:** High Cost Support is the amount each COLR receives from the South Carolina Universal Service Fund ("SC USF"). This amount is calculated by multiplying the High Cost Support per line by the number of eligible lines served by each COLR. (Definitions, p. 1)

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COLRs will receive High Cost Support based on the number of eligible residential and single-line business lines served by such COLR in a Designated Support Service Area. The amount of High Cost Support is determined by multiplying the number of eligible lines by the per line support available for such lines in the designated support service area. (Section IV, p.3)

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## VII. Data Requirements.

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B. Each ILEC must file the following data by July 1, 2002 and each year thereafter, on a form prescribed by the Commission, by Designated Support Service Area. The following data should be reported for the prior calendar year (as of December 31):

1. Number of residential USF access lines served by USF Designated Support Service Area rate group.
2. Number of single-line business USF access lines served by USF Designated Support Service Area.

(Section VII, p. 8.)

These provisions are utterly inconsistent with the ILECs revisionist lump sum argument. The USF was created by the General Assembly as a dynamic fund that would be recalculated on an

annual basis. The Commission adopted Guidelines and Administrative Procedures that specified that subsidies would be paid on a per-line basis and required the annual submission of information that would allow that calculation to be performed each year. The argument that the ILECs are entitled to a lump sum payment indefinitely finds no support in these provisions.

### **Conclusion**

The issue before the Commission is whether the ILECs can receive USF subsidy funding for unregulated bundles and contract offerings. The answer is that the ILECs clearly cannot receive such subsidies. While there is a basis for finding a regulatory compact in place by which the ILECs receive subsidies for providing regulated, below-cost basic local service, that compact does not support the extension of the subsidies to services over which the Commission has no jurisdiction. The Commission should order the ILECs to begin reporting bundles and contract offerings as ineligible lines and reporting as eligible lines only tariffed, regulated basic local service lines.

Dated this 17<sup>th</sup> day of February, 2010.

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